IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

v. Case Nos. 2019MM002346AXXXNB
2019MM002348AXXXNB

ROBERT KRAFT,

Defendant.
_____/

DEFENDANT ROBERT KRAFT'S MEMORANDUM OF LAW
IN FURTHER SUPPORT OF HIS MOTIONS FOR PROTECTIVE ORDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules and Regulations

Pursuant to Florida Rule of Criminal Procedure Rule 3.220(*l*), Defendant Robert Kraft respectfully submits this Memorandum of Law in Further Support of His Motions for Protective Order filed on March 21, 2019, and March 28, 2019 and in response to the arguments raised by the Media[1] in their Motions to Intervene. *See* Dkt. Nos. 29 ("ABC Mot."), 37 ("CNN Mot."), 56 (adopting CNN Mot.).[2]

PRELIMINARY STATEMENT

Rule 3.220(*l*) of the Florida Rules of Criminal Procedure authorizes this Court to enter a protective order limiting or restricting disclosure of, among other things, state, county, and municipal records. The rule provides that, "[***o***]***n a showing of good cause, the court shall*** at any time order that specified disclosures be restricted, deferred or exempted from discovery." Rule 3.220(*l*). Good cause exists here. Indeed, it is difficult to imagine a case that could better justify entry of a protective order.

It is undisputed that law enforcement obtained warrants contemplating continuous video surveillance (the "Videos"), over the course of five consecutive days, of unsuspecting masseuses

[1] The Media refers to the following parties who sought to intervene in this matter on March 26, 2019: ABC, Inc., The Associated Press, ESPN, Inc., Gannett Co., Inc., GateHouse Media, LLC, The McClatchy Company, The New York Times Company, Orlando Sentinel Communications Company, LLC, Sun-Sentinel Company, LLC, and TEGNA; on March 29, 2019: Cable News Network, Inc., CBS Corporation (CBS News, CBS Interactive and CBS Television Stations WFOR-TV and WBZ-TV), Graham Media Group, Inc. (including affiliates WJXT-TV, WCWJ-TV, and WKMG-TV), NBCUniversal Media, LLC (including NBC Miami WTVJ-TV), Scripps Media, Inc. (and affiliates WFTS-TV, WFTX-TV, WPTV-TV, and WTXL-TV), Sinclair Broadcast Group, Inc. (and affiliate WPEC-TV), Spectrum NLP, LLC l/k/a Spectrum News Bay News 9 and Spectrum News 13, and WPLG, Inc.; and on April 3, 2019: Boston Globe Media Partners, LLC. Undersigned counsel consulted counsel for the Media on April 5, 2019 in order to propose an agreement whereby Mr. Kraft would not oppose intervention by the Media, provided only that the Media would not press substantive claims to the Videos. Because the Media have yet to accept that proposal, Mr. Kraft is proceeding as he is in order to protect his rights and explain why the Media are overreaching in substance by claiming entitlement to the Videos.

[2] All docket number references in this memorandum of law relate to docket entries in Case No. 2019MM002348AXXXNB.

and disrobed massage customers in private massage rooms. In some instances, according to police, sexual acts occurred between the masseuses and the customers; in others, they did not. In all instances, the private massages were monitored by police and covertly captured on video. Whatever the parties may dispute, it should be common ground that disclosure of the Videos would compromise the privacy interests of the individuals captured on tape in ways that transcend the misdemeanor prosecution at hand. It should also be undisputed that the Court has before it pending submissions by Mr. Kraft—namely, a motion and memorandum in support of suppression—that stand for the proposition that law enforcement obtained the Videos in a lawless, unconstitutional, *ultra vires* fashion. It would follow from any grant of suppression, which this Court has yet to decide, that no such videos should ever have been made by the police, much less be broadcast around the world. To nonetheless permit media and public access to the Videos would inflict irreparable harm on Mr. Kraft before essential legal determinations and proceedings can run their course. Public disclosure at this stage could similarly destroy any prospect of Mr. Kraft receiving a fair trial. This combination of circumstances affords a compelling basis for entering a protective order at this time.

As discussed more fully below, discovery in this case has not yet begun and there is, in any event, good cause to enter a protective order restricting the public disclosure of the Videos. Not only are the Videos expressly exempt from public disclosure under Florida's Public Records Act, but disclosure of them would trample Mr. Kraft's core constitutional rights. In particular, disclosure would further infringe Mr. Kraft's constitutionally protected privacy rights and interests, as well as his constitutional right to a fair trial, in ways that thereafter could not be cured. Nor do the interests invoked by the Media weigh as heavy on the scales, or even belong on the scales, particularly at this early stage of the proceeding. Rights of public access are

important, to be sure, but those rights simply do not go so far as to entitle the Media to get out in front of these proceedings, preempt suppression rulings, and crack open protected law-enforcement files so as to unearth the most sensitive and suspect portions thereof without regard for the defendant's legitimate privacy and due process rights, before the defendant himself has even requested them. A protective order should be entered forthwith.

ARGUMENT

As noted, the Florida Rules of Criminal Procedure expressly provide for the entry of a protective order in appropriate circumstances. "On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred or exempted from discovery[.]" Rule 3.220(*l*). Here, the Media are seeking the most sensitive and suspect material in the case even as settled law calls for its protection—while law enforcement maintains the Videos as protected and discovery has yet to commence. The extraordinary circumstances present in this case provide all the more reason for the Court to safeguard the material at issue. In sum, entry of a protective order is not only appropriate, but imperative.

I. THE VIDEOS ARE EXEMPT FROM PUBLIC DISCLOSURE AS ACTIVE CRIMINAL INTELLIGENCE AND INVESTIGATIVE INFORMATION

As a threshold matter, the Videos are exempt from public disclosure because they constitute "[a]ctive criminal intelligence information and[/or] active criminal investigative information." §119.071(2)(c)(1), Fla. Stat. A protective order is appropriate to ensure that these exempt Videos remain exempt, non-public records.

Article I, Section 24(a), of the Florida Constitution grants "[e]very person . . . the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf." Chapter 119 of the Florida Statutes—known as the Public Records Act—implements this policy by

making "all state, county, and municipal records [] open for personal inspection and copying by any person." § 119.01(1), Fla. Stat. "The general purpose of the Florida Public Records Act is to open public records so that Florida's citizens can discover the actions of their government." *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994).

Yet the public's right to access public records is by no means unbounded or unqualified. The Public Records Act contains several important exemptions that prevent or otherwise restrict the disclosure of public records. As relevant here, § 119.071(2)(c) of the Public Records Act authorizes a public agency to refuse access to "[a]ctive criminal intelligence information and active criminal investigative information." § 119.071(2)(c)(1), Fla. Stat. This exemption furthers "the critical importance of preserving the confidentiality of police records surrounding and compiled during an active criminal investigation," *Riviera Beach*, 642 So. 2d at 1136, and is intended to "prevent premature disclosure of information during an ongoing investigation being conducted in good faith by criminal justice authorities," *Barfield v. City of Ft. Lauderdale Police Dep't*, 639 So. 2d 1012, 1017 (Fla. 4th DCA 1994); *see also Fla. Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128, 1131 (Fla. 1st DCA 1985) ("[T]he legislature fully comprehended that disclosure of the status of a criminal investigation by requiring production of particular information developed during its progress would often impede the development of new leads and prevent successful conclusion of the investigation and the arrest of the offender.").

In order for this exemption to apply, the material at issue must constitute "criminal intelligence information" or "criminal investigative information" and pertain to an "active" criminal proceeding. *See* § 119.071(2)(c)(1), Fla. Stat. The Public Records Act defines "criminal intelligence information" to include "information . . . collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." §

119.011(3)(a), Fla. Stat. "Criminal investigative information," on the other hand, is defined to include "information . . . compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance." § 119.011(3)(b), Fla. Stat. Criminal intelligence/investigative information "is 'active' 'as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future [including] ***while such information is directly related to pending prosecutions or appeals***.'" *State v. Cable News Network*, 251 So. 3d 205, 211 (Fla. 4th DCA 2018) (quoting § 119.011(3)(d), Fla. Stat.) (emphasis added).

There should be no serious question here that the Videos constitute both "criminal intelligence information" and "criminal investigative information." Indeed, the Jupiter Police Department ("JPD") agrees that the Videos qualify for protection. The Videos were created by JPD as part of its efforts to monitor and investigate possible criminal prostitution at the Spa. *See* Dkt. No. 55, Ex. A (Probable Cause Affidavit of JPD Det. Andrew Sharp, Jan. 15, 2019 ("Aff." or "Affidavit")) at 9. The Videos, therefore, clearly qualify as "criminal intelligence information." *See* § 119.011(3)(a), Fla. Stat. Relatedly, the Videos contain information that is derived from the JPD's week-long covert surveillance of the Spa and are, therefore, "criminal investigative information." *See* Aff. 10–11; *see also* § 119.011(3)(b), Fla. Stat. Nor should there be any serious doubt that the Videos pertain to an "active" criminal proceeding. Not only is there a "pending prosecution," *Cable News Network*, 251 So. 3d at 211 (quoting § 119.011(3)(d), Fla. Stat.), but there are several preliminary hearings scheduled for this month and trial is set to follow shortly thereafter. Because this is an "active," "pending" criminal proceeding (*see id.* &

§ 119.071(2)(c)(1), Fla. Stat.), and because the Videos qualify as "criminal intelligence information" and/or "criminal investigative information" (*see* § 119.011(3)(a), (b), Fla. Stat.), the Videos are exempt from public disclosure. Accordingly, the Court should enter a protective order to ensure that the Videos are not disseminated to the public.

In their Motions to Intervene, the Media make several misconceived arguments against the application of the active criminal investigative/intelligence information exemption. For one, the Media contend that the Videos are not subject to this exemption because, they claim, the Videos ***may*** be produced in discovery at some point. *See* ABC Mot. at 9; *see also* CNN Mot. at 7 ¶ 10. It is well settled, however, that ***unless and until*** such production happens, the Videos are "not open to the public." *WESH Television, Inc. v. Freeman*, 691 So. 2d 532, 534 (Fla. 5th DCA 1997). It is only "[o]nce the information is delivered to the defendant [that] the information attains the status of a public record." *Id.* But no such delivery has happened here, nor has Mr. Kraft requested that the Videos be produced. Accordingly, the Media's argument that the Videos are non-exempt because they ***may*** be produced is premature and speculative at best—and may never find any purchase to the extent Mr. Kraft forbears from requesting discovery.

Next, the Media claim that the active criminal investigative/intelligence information exemption does not apply because the relevant agency—in this case the JPD—"may waive the exemption and disclose information at its discretion." ABC Mot. at 8; *see also* CNN Mot. at 7 ¶ 9. As to any potential waiver, it suffices to note that the JPD has ***not*** waived the exemption. To the contrary, the JPD continues to maintain the videotapes as protected under Florida statutes and has, rightly, refused to release them. *See* § 119.071(2)(c)(1), Fla. Stat., *see also* § 119.071(2)(h)(1)(c), Fla. Stat. In the present posture, therefore, the active criminal investigative/intelligence information exemption applies with full force. Moreover, to the extent

the JPD may, at some point in the future, change its position and attempt to waive the exemption, that is ***precisely*** the reason why a protective order should be entered at that time, thereby ensuring Mr. Kraft can be heard and his rights can be considered and adjudicated by this Court before any irretrievable breach occurs.

The Media next suggest (without any authority) that this matter is not an active criminal proceeding because "the suspects have been identified and arrested." ABC Mot. at 8; *see also* CNN Mot. at 6–7 ¶ 8. But that is flatly wrong. Criminal proceedings are considered to be "active" even where, as here, prosecution remains pending. *See* § 119.071(2)(c)(1), Fla. Stat. For purposes of § 119.071(2)(c)(1), it is irrelevant that the suspects have been identified and arrested. *See State v. Kokal*, 562 So. 2d 324, 325–26 (Fla. 1990) (holding that the term "pending prosecutions or appeals" in §119.011(3)(d) applies to "ongoing prosecutions or appeals from convictions and sentences which have not become final").

Finally, the Media argue that, because the Palm Beach County State Attorney's Office has already released to the public certain materials, including arrest reports and probable cause affidavits, it follows that the active criminal investigative/intelligence information exemption is waived as to other materials, including the Videos. *See* ABC Mot. at 10; CNN Mot. at 8 ¶ 12. That argument, too, is mistaken. It is well established that limited references to evidence in publicly disclosed reports do not waive the active criminal investigative/intelligence information exemption over that underlying evidence or other related materials. *See City of Miami v. Post-Newsweek Stations Fla., Inc.*, 837 So. 2d 1002, 1004–05 (Fla. 3d DCA 2002) (reversing grant of access because the "release of the 911 tape and the incident report" containing only a "brief remark about the size and location of the injury and one sentence concerning" the crime did not require release of a "ten page detailed written statement and the close-up photograph of the

injury"); *see also Post-Newsweek Stations, Fla. Inc. v. Doe*, 612 So. 2d 549, 552–53 (Fla. 1992) (affirming order releasing list of "names and addresses" of purported prostitution clients without releasing documents containing "intimate information" and stating that "we emphasize that the public does not have a universal right to all discovery materials"). More generally, the Media's argument proves too much: it would require the disclosure of ***all*** criminal intelligence/investigative materials once any ***limited*** documents concerning the same subject matter were made public. That is simply not the law. *Cf. Barfield v. City of Ft. Lauderdale Police Dep't*, 639 So. 2d 1012, 1017 (Fla. 4th DCA 1994) ("[W]e have not forgotten our duty to construe the exemptions narrowly. That duty, however, does not mandate a construction so narrow that the very purpose of the exemption, no matter how limited, is effectively defeated.").

In short, none of the arguments raised by the Media in their Motions to Intervene changes the simple, straightforward conclusion that the Videos contain criminal investigative and/or intelligence information pertaining to an active criminal prosecution and are, for that reason, exempt from public disclosure.

Were that not enough, an additional exemption applies according to law enforcement. Specifically, under § 119.071(2)(h)(1)(c) of the Florida Statutes, "criminal intelligence information or criminal investigative information is confidential and exempt" if that information includes a "photograph, videotape, or image of any part of the body of the victim of a sexual offense." Because the JPD deems the masseuses who are alleged to have performed the sex acts to be "victims of a sexual offense," the Videos are confidential and exempt from disclosure under § 119.017(2)(h)(1)(c), Fla. Stat.; *see State v. Wang*, Case No. 50-2019-CF-001606-BXXX-MB, Dkt. No. 242, ¶ 8 (Fla. 15th Cir. Ct. Apr. 1, 2019) (related female defendant seeking

protective order based on "victim" status under § 119.071(2)(h)(1)(c) of the Florida Statutes). The Media have not identified any basis for overcoming that separate exemption.

II. IN ANY EVENT, A PROTECTIVE ORDER IS NECESSARY TO PROTECT MR. KRAFT'S CONSTITUTIONAL RIGHTS

As discussed *supra* Section I, the Videos are currently exempt from public disclosure under the Public Records Act, by its terms. That alone is reason to enter a protective order restricting the disclosure of the Videos. Were the Court nonetheless to conclude that the Videos are non-exempt "public records" subject to public disclosure, however, it should still enter a protective order as to the Videos for the sake of protecting Mr. Kraft's constitutional rights. The Florida Supreme Court has expressly and repeatedly held that, even where requested material qualifies as a "public record" subject to public disclosure, the public may still be denied access to such material in certain circumstances, including where it is established that the release of the materials would (i) infringe on the privacy rights of a party, *see Doe*, 612 So. 2d at 553, or (ii) interfere with a defendant's right to a fair trial, *see Fla. Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d at 34–35 (Fla. 1988). Because the public release of the Videos would infringe upon Mr. Kraft's constitutionally protected privacy rights and would interfere with Mr. Kraft's ability to obtain a fair trial, the Court has additional grounds for entering a protective order and preventing the disclosure of the Videos.

A. A Protective Order Is Necessary To Prevent Further Violations Of Mr. Kraft's Privacy Rights

It is well settled under Florida law that privacy concerns can form a valid basis for withholding materials involved in a judicial proceeding from public disclosure. *See Doe*, 612 So. 2d at 551, 553; *see also Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113, 118 (Fla. 1988). Individuals seeking to prevent the disclosure of such information based on a claim that the disclosure would violate their right to privacy "bear the burden of proving that ***closure is necessary to prevent an imminent threat to their privacy rights***." *Doe*, 612 So. 2d at 551 (emphasis added). As discussed at length in Mr. Kraft's recently filed Motion to Suppress, the Videos, which are now sought by the Media, were obtained by the JPD ***illegally*** and in violation of Mr. Kraft's constitutional privacy rights guaranteed under both the Fourth Amendment to the U.S. Constitution and Article I, Section 12, of the Florida Constitution, which provides privacy protections even greater than those of the U.S. Constitution. *See In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (Florida's privacy "amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution").

As discussed in the pending Motion to Suppress, the JPD obtained the Videos through a highly invasive—indeed unlawful—"sneak and peek" warrant that purported to authorize law enforcement to install hidden surveillance cameras in multiple private massage rooms where Spa customers would be stripping naked as a matter of course; the JPD did so in order to prosecute what are, at most, misdemeanor offenses. *See* Dkt. No. 55 at 1–3. Such a warrant is categorically unavailable under these circumstances. *See id.* at 11–15. Indeed, it was only through a series of material misrepresentations and omissions that the JPD was able to convince the issuing judge to issue the "sneak and peek" warrant by leading him to believe (incorrectly) that far more serious criminal activity was afoot, *i.e.* human trafficking. *See id.* at 24–26. But

no such activity was afoot, as the JPD well knew. *See id.* What is more, the JPD obtained the authorization it did while knowing full well that a wide array of alternative, benign modes of proof was readily available (*see id.* at 17–22), and without making any meaningful attempt to minimize the privacy intrusions upon Spa patrons (*see id.* at 22–24).

On this last point, concerning the JPD's willful failure to abide by the most basic minimization standards for such an intrusive search, Mr. Kraft's counsel have recently learned that the JPD conceded to another attorney that *their covert videotaping captured a routine, entirely non-sexual massage of that attorney's client.* That individual has not been charged with any offenses by the JPD. We expect it will be revealed at the suppression hearing that police—consistent with the unbounded, dragnet nature of the video-surveillance program they orchestrated—in fact wound up covertly recording *multiple* people who received similarly routine, non-sexual massages without being charged with any offense. By proceeding as it did, the JPD violated core constitutional privacy rights of not only the defendants in this investigation but also all of the Spa's other patrons and masseuses, as protected by both the United States and Florida Constitutions.

The Court has set a hearing to address Mr. Kraft's Motion to Suppress for April 26, 2019. *See* Dkt. No. 63. Given the pendency of Mr. Kraft's suppression motion, which raises critically important legal objections and constitutional concerns, the Court should, ***at a minimum***, enter and maintain a protective order while it considers the fundamental, antecedent legal questions posed by Mr. Kraft's motion. Such an order is particularly necessary at this preliminary stage (prior to discovery) in order to preserve the status quo and ensure against the intervening release of the Videos, which the Court may ultimately determine to have been illegally obtained. Should the Videos be prematurely released—only to later be deemed illegal—Mr. Kraft would

obviously suffer irreparable harm, for he would have no mechanism to prevent the further dissemination of the illegally obtained Videos. *See Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 838–42 (C.D. Cal. 1998) (release of video of sexual encounter would cause "irreparable injury" because "[s]exual relations are among the most personal and intimate of acts," and "the privacy of the acts depicted on the Tape ***cannot be restored*** . . . after the Tape becomes public," noting that "***[t]he nature of the Internet aggravates the irreparable nature of the injury***" where the video would be "available for instant copying and further dissemination" (emphases added)). Under these circumstances, the Court should, at a minimum, enter a protective order prohibiting the release of the Videos until the Court decides Mr. Kraft's Motion to Suppress. Given that the Court has already set a hearing on the Motion to Suppress just two weeks after the hearing on the Motion for Protective Order, neither the Media nor the public would be prejudiced during this modest—yet vitally important—delay. By contrast, the harm Mr. Kraft would suffer if the Videos were released prior to the Court's decision on the Motion to Suppress would be grave and would effectuate the very violation of his privacy rights that the Motion is intended to vindicate.

If, after reviewing Mr. Kraft's Motion to Suppress, the Court agrees that the JPD's surreptitious and indiscriminate use of covert video surveillance at the Spa violated Mr. Kraft's constitutional rights to privacy, the Court should on that basis (independent of those noted above) enter the protective order on a permanent basis. In those circumstances, the public's purported right to access the Videos must yield to Mr. Kraft's constitutional rights to privacy, which, at that point, will have been proven to have been violated.[3] The public's right to access

[3] Although Florida's constitutional right to privacy has been construed as yielding to the specific protections and procedures attending search warrants, *see Limbaugh v. State*, 887 So. 2d 387, 392 ("[T]he right of privacy in article I, section 23, has no application to searches and seizures ***complying*** with article 1, section 12.") (emphasis added), the necessary premise is that a ***valid*** search warrant obviates further consideration of the relevant privacy interests. To the extent that the search

cannot possibly trump Mr. Kraft's privacy rights ***after*** this Court determines that those rights were violated and that procurement of the Videos was illegal at its inception. And the Florida Supreme Court has repeatedly rejected argument such as the Media's, recognizing that the public's right to access must yield to individuals' right to privacy whenever such rights are violated. *See Barron*, 531 So. 2d at 118 (recognizing that "closure of court . . . records should occur [] when necessary . . . to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right"); *see also Doe*, 612 So. 2d at 551 ("qualify[ing] the public's statutory right of access to pretrial discovery information by balancing it against [one's] constitutional right to privacy"). Thus, if the Court ultimately grants Mr. Kraft's Motion to Suppress, it should permanently enter the protective order to ensure that the illegally obtained Videos—which police should have never created in the first place—are not disseminated. *See, e.g.*, *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 857 (9th Cir. 1997) (ordering return of computers and electronic storage devices which had been seized pursuant to an invalid warrant); *United States v. Wey*, 256 F. Supp. 3d 355, 404 (S.D.N.Y. 2017) (noting that the failure to return original documents seized in excess of scope of warrant was a potential constitutional violation while holding that warrants were wholly invalid); *United States v. Matias*, 836 F.2d 744, 747 (2d Cir. 1988) ("[W]hen items outside the scope of a valid warrant are seized, the normal remedy is suppression and return of those items . . . .").

In their Motions to Intervene, the Media claim that "[t]he Florida Constitution 'does not provide a right of privacy in public record.'" ABC Mot. at 10 (quoting *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985)); CNN Mot. at 9 ¶ 15 (same). The Media thereby misses a key, dispositive aspect of Florida law. While it is generally true that one's privacy rights cannot

---

warrant at issue here was ***not*** valid, it follows that Mr. Kraft's constitutional right to privacy applies in full force.

"limit the public's right of access to public records" (Art. I, § 23, Fla. Const.), including as to police records, the exception to that rule is where, as here, there is a "***constitutional right of privacy which prevents access upon request***." *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) (recognizing that cases dealing "with the public's right of access to examine public records" are based on "the principle that there is no constitutional right of privacy which prevents access upon request"); *cf. Bd. of Cty. Comm'rs of Palm Beach Cty. v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001) ("There is no right to privacy in public records in which there is no legitimate expectation of privacy from governmental intrusion."). As discussed, because the Videos were obtained in violation of Mr. Kraft's constitutional rights to privacy, the Media has no public right of access. *See, e.g., Doe*, 612 So. 2d at 551; *Barron*, 531 So. 2d at 118; *Miami Herald Media Co. v. State*, 218 So. 3d 460, 464 (Fla. 3d DCA 2017) (restricting public access to videotapes, in part, because "part or all of the videotapes might later be excluded for reasons not yet presented to, or ruled upon, by the trial court"); *United States v. McVeigh*, 119 F.3d 806, 813–14 (10th Cir. 1997) (affirming sealing of materials related to Oklahoma City Bombing stating that "the First Amendment right of access does not extend to the evidence actually suppressed in the suppression hearing" because "disclosure of such evidence would play a negative role in the functioning of the criminal process, by exposing the public generally, as well as potential jurors, to incriminating evidence that the law has determined may not be used to support a conviction"). This conclusion is bolstered by the fact that Florida's right of privacy "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *In re T.W.*, 551 So. 2d at 1192.

B. A Protective Order Is Necessary To Protect Mr. Kraft's Sixth Amendment Right To A Fair Trial

Finally, a protective order is necessary to protect Mr. Kraft's right to a fair trial, as guaranteed to him under the Sixth Amendment to the U.S. Constitution. *See McCrary*, 520 So. 2d at 35. If the Videos, which merely appeal to prurient interests and serve no legitimate news-related purpose, are released to the public, the result would be to taint the entire jury pool, thereby frustrating Mr. Kraft's ability to obtain a fair trial. In the instant circumstances, a protective order is essential.

The U.S. Supreme Court has characterized the right to a fair trial as the "most fundamental of all freedoms" and one which must be "maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965). This Court therefore "has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity" in order "[t]o safeguard the due process rights of the accused." *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979). This Court must take affirmative steps to "protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten fairness of his trial and the abrogation of his constitutional rights." *State ex rel. Miami Herald Publ'g. Co. v. McIntosh*, 340 So. 2d 904, 909 (Fla. 1976) (citing *United States v. Dickinson*, 465 F.2d 496, 502 (5th Cir. 1972)). "[W]here a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield." *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 380 (Fla. 1987); *see also Bundy v. State*, 455 So. 2d 330, 338 (Fla. 1984) (a balancing test between the right of public access and a defendant's right to a fair trial must be applied so as to recognize the weightier considerations of the defendant).

In balancing a criminal defendant's Sixth Amendment rights against claimed media entitlement to access and disclosure for purposes of considering protective orders, Florida courts

consider three factors: (1) whether a protective order is "necessary to prevent a serious and imminent threat to the administration of justice;" (2) whether "alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial;" and (3) whether "closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose." *Miami Herald Publ'g. Co. v. Lewis*, 426 So. 2d 1, 6 (Fla. 1982); *see McCrary*, 520 So. 2d at 35 (finding these *Lewis* factors all "relevant to a finding of cause," and stating that they "should be considered in determining whether public access to a judicial public record should be restricted or deferred"). All three factors favor sealing the Videos.

First, there is a serious and imminent risk that Mr. Kraft cannot enjoy a fair trial if the Videos are unsealed. As the Court is well aware, this case has not been treated by the police, prosecution or the Media as a typical, run-of-the-mill misdemeanor case. To the contrary, this case, even in its infancy, has generated more press coverage and media attention than perhaps any other misdemeanor prosecution in recent history. Indeed, law enforcement and the prosecution have gone to great lengths to drum up media interest, to the point of holding press conferences featuring references to Mr. Kraft alongside incendiary, irresponsible, unfounded allusions to human trafficking. *See* Dkt. No. 55, Ex. E (Tr. of JPD's Feb. 22, 2019 Press Conf.) at 1; *see also* Dkt. No. 55, Ex. F (Tr. of Palm Beach State Attorney's Office Feb. 25, 2019 Press Conf.) at 1–2, 4–5. For the resulting media frenzy to trigger release of sensitive material even before this criminal proceeding and orderly adjudication of critical issues runs its course would take the government's transgressions to even worse depths of perversity and destroy any prospect of a fair trial.

Notably, much of the attention to date has focused on the illegally obtained Videos, which the JPD claims depict low-level acts of solicitation. And the Media, following the prosecution's cues, has fixated on Mr. Kraft as far and away the highest-profile defendant facing prosecution. But the Media's outsized appetite for the Videos—the substance of which is ***already*** purportedly described in publicly available documents—appears to be based not on a desire to shed light on an important public event, but rather appeal to the prurient interests of certain members of the public. If released, these highly prejudicial, illegally obtained, irrelevant, and non-newsworthy[4] Videos are guaranteed to be broadcast all around the world, thereafter making it virtually impossible for Mr. Kraft to obtain a fair trial. Accordingly, Mr. Kraft's fair trial rights demand that the Videos be sealed.

Courts around the country routinely restrict the public's access to such salacious materials in similar circumstances in order to preserve a criminal defendant's right to a fair trial. *See McCrary*, 520 So. 2d at 33 (affirming order sealing certain pre-trial discovery material to safeguard fair trial rights based on "findings that the discovery material was graphically incriminating, containing materials which might not be admissible at trial"); *Miami Herald Media Co.*, 218 So. 3d at 463–65 (affirming lack of access to "inflammatory" images and information that "clearly favor the prosecution" and "could cause prospective venire persons to prejudge guilt"); *United States v. Gurney*, 558 F.2d 1202, 1209–10 (5th Cir. 1977) ("The press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain," noting that, "[i]n a widely publicized case, the right of the

[4] *See* Nick Madigan and Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, N.Y. Times (Mar. 18, 2016), available at https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html (news organization sued for publishing sex tape of two consenting adults without their permission and found liable for $115 million because the sex tape was deemed non-newsworthy).

accused to trial by an impartial jury can be seriously threatened by the conduct of the news media prior to and during trial."); *United States v. Beckham*, 789 F.2d 401, 415 (6th Cir. 1986) (affirming decision not to release tapes in public corruption case where an "increase in publicity from the audiotapes and videotapes would affect the already hostile community atmosphere to a degree that would pervade the entire community").[5]

Second, without sealing the Videos, there would be no way to properly protect Mr. Kraft's right to a fair trial. Unless the Videos are sealed, they will promptly be released to the Media and quickly broadcast online and on television for millions of people around the world to see. If that were to happen, it would immediately and irretrievably taint the jury pool not just in Palm Beach County, but in neighboring counties (and states) as well. Sealing is the most sensible option. *See Lewis*, 426 So. 2d at 2 (affirming trial court order to close suppression hearing and seal record where "[t]he public was virtually inundated with information detailing the crime" from media coverage); *Miami Herald Media Co.*, 218 So. 3d at 463–65 (noting that the "speed of dissemination and the high percentage of likely jurors with access to social media and the internet also support[ed] the trial judge's concern").

Third, sealing the Videos would go no further than necessary to protect the rights of Mr. Kraft. *See Lewis*, 426 So. 2d at 3. Notably, the public already has access to other less inflammatory and less prejudicial materials that purport to describe the content of the Videos, and Mr. Kraft has not opposed dissemination of those materials. Because the Videos add

---

[5] *See also, e.g.*, *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (compelling reasons for sealing court records exist when "court files might have become a vehicle for improper purposes, such as the use of records to gratify private spite [or] promote public scandal"); *Qayumi v. Duke Univ.*, 2018 WL 2025664, at *4 (M.D.N.C. May 1, 2018) (sealing video of sexual encounter would "***protect[] the dignity of the proceedings and prevent[] misuse***," where plaintiff had a "compelling interest in sealing the video, which was taken without her consent and over her objection") (emphasis added).

nothing appreciable to the public discourse (as distinct from tawdry, tabloid fodder) while posing obvious, pronounced risks to Mr. Kraft's constitutional right to a fair trial, the case for a limited protective order is overwhelming.

CONCLUSION

For the reasons set forth above and in the Joint Motion for Protective Order and the Amended Motion for Protective Order, the Court should grant these motions and enter the Proposed Protective Order filed on March 21, 2019.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Service to Assistant State Attorneys Judy Arco (Jarco@sa15.org), Elizabeth Neto (Eneto@sa15.org), Al Johnson (Ajohnson@sa15.org), Greg Kridos, (Gkridos@sa15.org), 401 North Dixie Highway, West Palm Beach, Florida 33401;Thomas Baird, Jones Foster, 4741 Military Trial, Suite 200, Jupiter, Florida 33458 (Tbaird@Jonesfoster.com); Joanne O'Connor, Jones Foster, 505 South Flagler Drive, Suite 1100, West Palm Beach, FL 33401 (JOConnor@jonesfoster.com) and all parties listed on the Court's E-Service List, on this 10th day of April, 2019.

Respectfully Submitted,

ATTERBURY, GOLDBERGER & WEISS, P.A.

By: /s/ *Jack Goldberger*
Jack Goldberger
250 Australian Ave. South, Suite 1400
West Palm Beach, FL 33401
(561) 659-8300

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

William A. Burck (admitted *pro hac vice*)
Alex Spiro (admitted *pro hac vice*)

williamburck@quinnemanuel.com
1300 I Street NW, Suite 900
Washington, D.C. 20005
(202) 538-8000

alexspiro@quinnemanuel.com
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

Attorneys for Defendant Robert Kraft